Khairil Anuar bin Muda & Ors v Sulong bin Muda & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO T-02(NCVC)(W)-37–01 OF 2016
ALIZATUL KHAIR, ZABARIAH MOHD YUSOF AND HARMINDAR SINGH JJCA
30 OCTOBER 2017

Contract — Capacity — Minor — Whether agreement entered by minors — Whether agreement valid and binding on all parties

Limitation — Trusts — Trust property — Whether appellant's claim barred by limitation — Limitation Act 1953 s 22(1)(b)

This was an appeal against the decision of the High Court. The parties to this suit were beneficiaries of Muda bin Hj Deraman ('the deceased') who left behind properties without a will. The appellants were appointed as executors of the estate of the deceased. The properties included two Shell petrol stations, one in Cabang Tiga, which was built on land belonging to Shell; and another in Kuala Nerus, built on land belonging to the deceased. The respondents later entered into an agreement in 1991 ('the 1991 agreement') where the Kuala Nerus petrol station was to be given to the second defendant. When the 1991 agreement was entered, some of the appellants were still minors. In 2014, the appellants filed an instant suit seeking for a declaration that the 1991 agreement, which was signed by the fourth, 15th, 16th and 17th appellants and both defendants, was null and void. The appellants further sought for an order that the administrators of the estate of the deceased be authorised to take control of the two petrol stations in question and the profits be divided among the appellants and the respondents according to their entitlement as declared in the *hukum faraid*. The trial judge had dismissed the appellants' claim and allowed the defendants' counterclaim. The issues in this appeal were: (a) whether the appellants' claim was barred by limitation; (b) whether the 1991 agreement was valid and binding on all parties as the appellants had contended that at the time of the 1991 agreement, eight of the beneficiaries were minors with no capacity to enter into a contract; and (c) whether the business of the two petrol stations ended with the death of the deceased and the subsequent setting up of the new businesses by the defendants.

Held, allowing the appeal and setting aside order of the High Court with costs of RM15,000 subject to allocator:

(1) The learned judge was plainly wrong in his finding that the appellants' action was barred by limitation. By virtue of s 22(1)(b) of the Limitation

Act 1953, the action commenced by the appellants was an action by beneficiaries to recover trust property from a trustee and therefore no limitation period applied to the appellants' claim (see paras 10–11).

(2) In entering the 1991 agreement, the guardians were involved in the disposal of the minors' property. Therefore, s 15 of the Guardianship of Infants Act 1961 was applicable in the circumstances. Since no leave of court was obtained for disposal of the minor's property by the mother, the disposal as set out in the 1991 agreement was void (see para 18).

(3) The land of the deceased, on which the Kuala Nerus petrol station was situated, became estate property upon the death of the deceased. The trial judge was plainly in error when he declared that the business, and consequently the land on which the business was situated, was not part of the estate (see para 20).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi. Pihak-pihak kepada tindakan ini adalah benefisiari-benefisiari Muda bin Hj Deraman ('si mati') yang meninggalkan hartanah tanpa wasiat. Perayu-perayu dilantik sebagai pentadbir estet si mati. Hartanah tersebut termasuk dua stesyen minyak Shell, satu di Cabang Tiga, yang dibina atas tanah yang dimiliki oleh Shell; dan satu lagi di Kuala Nerus, yang dibina atas tanah yang dimiliki oleh si mati. Responden-responden kemudiannya memasuki perjanjian pada tahun 1991 ('perjanjian 1991') di mana stesyen minyak Kuala Nerus diberikan kepada defendan kedua. Apabila perjanjian dimasuki, beberapa perayu masih di bawah umur. Pada tahun 2014, perayu-perayu memfailkan tindakan ini memohon untuk perisytiharan bahawa perjanjian 1991, yang ditandatangani oleh perayu-perayu keempat, 15, 16 dan ke 17 dan kedua-dua defendan, tak sah dan batal. Perayu-perayu selanjutnya memohon untuk perintah bahawa pentadbir-pentadbir estet si mati diberi kuasa untuk mengawal kedua-dua stesyen minyak yang dipersoalkan tersebut dan keuntungan dibahagikan di antara perayu-perayu dan responden-responden mengikut hak mereka seperti yang diisytiharkan di dalam hukum faraid. Hakim perbicaraan telah menolak tuntutan perayu-perayu dan membenarkan tuntutan balas defendan-defendan. Isu-isu dalam rayuan ini adalah: (a) sama ada tuntutan perayu-perayu dihalang oleh had masa; (b) sama ada perjanjian 1991 adalah sah dan mengikat ke atas kesemua pihak kerana perayu-perayu telah berhujah bahawa pada masa perjanjian 1991 tersebut, lapan daripada benefisiari-benefisiari adalah di bawah umur tanpa kapasiti untuk memasuki kontrak; dan (c) sama ada perniagaan kedua-dua stesyen minyak tersebut berakhir dengan kematian si mati dan penubuhan perniagaan baru oleh defendan-defendan kemudiannya.

Diputuskan, membenarkan rayuan dan mengenepikan perintah Mahkamah Tinggi dengan kos sebanyak RM15,000 tertakluk kepada alukator:

(1) Hakim yang bijaksana jelas salah dalam dapatannya bahawa tindakan perayu-perayu adalah dihalang oleh had masa. Mengikut s 22(1)(b) Akta Had Masa 1953, tindakan yang dimulakan oleh perayu-perayu adalah tindakan oleh benefisiari-benefisiari untuk mendapatkan kembali amanah hartanah daripada pemegang amanah dan oleh itu tiada tempoh had masa diguna pakai kepada perayu-perayu (lihat perenggan 10–11).

(2) Dalam memasuki perjanjian 1991, penjaga-penjaga terlibat dalam pelepasan hartanah pemilik bawah umur. Oleh itu, s 15 Akta Penjagaan Kanak-Kanak 1961 adalah diguna pakai dalam keadaan. Memandangkan tiada izin mahkamah diperolehi bagi pelepasan hartanah orang bawah umur oleh ibu, pelepasan yang ditetapkan di dalam perjanjian 1991 adalah batal (lihat perenggan 18).

(3) Tanah si mati, atas mana stesyen minyak Kuala Nerus terletak, menjadi hartanah estet atas kematian si mati. Hakim perbicaraan jelas silap apabila beliau mengisytiharkan bahawa perniagaan, akhirnya tanah di atas mana perniagaan terletak, bukan sebahagian estet tersebut (lihat perenggan 20).]

Notes

For cases on capacity in general, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 4136–4144.

For cases on trust property, see 9 *Mallal's Digest* (5th Ed, 2015) 2654–2656.

Cases referred to

Leha binte Jusoh v Awang Johari bin Hashim [1978] 1 MLJ 202, FC (refd)

Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene [1995] 1 MLJ 115, HC (refd)

Mohd Ali Jahn bin Yusop Sahibjahn v Zaleha bte Mat Zain & Anor [1994] MLJU 474; [1995] 1 CLJ 533, HC (refd)

Mohori Bibee v Dharmodas Ghose (1903) 30 Cal 539, PC (refd)

Panchanath a/l Ratnavale (suing as the beneficiary to the estate of Ratnavale s/o Mahalingam @ Mahalingam Ratnavale deceased under will dated 10 February 1971) v Sandra Segara Mahalingam (sued as the executor and trustee of the last will of Ratnavale s/o Mahalingam @ Mahalingam Ratnavale deceased dated 10 February 1971) & Ors [2012] 5 MLJ 109, HC (refd)

Legislation referred to

Age of Majority Act 1971 s 4

Contracts Act 1950 ss 10, 11

Guardianship of Infants Act 1961 s 15

Guardianship of Infants Ordinance 1934 (repealed by Guardianship of Infants Act 1961) s 15

Indian Contracts Act 1872 [IND] ss 10, 11

Limitation Act 1953 ss 6, 22, 22(1)(b)

Appeal from: Civil Suit No 22 NCVC-35–11 of 2014 (High Court, Kuala Terengganu)

Abdul Aziz Hasan (Fozi Addhwa bin Mohamed Fozi with him) (Nordin Kassim & Aziz) for the appellants.

Mohd Zubir bin Abu Bakar (Wan Mohd Haidi bin Wan Jusoh and Wan Ahmad Faiz bin Wan Abdullah with him) (Jailani Zubir & Partners) for the respondents.

Harmindar Singh JCA (delivering judgment of the court):

[1] This is an appeal against the decision of the High Court at Kuala Terengganu delivered on 30 November 2015 after a full trial. The High Court had dismissed the plaintiffs' claim and allowed the defendants' counterclaim with costs of RM10,000.

[2] This appeal was heard on 6 July 2017. After hearing the parties and taking into consideration the written submissions, we allowed the appeal and set aside the order of the High Court. Our reasons for doing so now follow. Where convenient, the parties will be referred to as they were in the High Court.

SALIENT FACTS

[3] The salient facts giving rise to the civil suit have been well summarised by the learned trial judge in the grounds of judgment and are reproduced as follows.

> 1. Plaintif-Plaintif dan Defendan-Defendan adalah merupakan waris-waris MUDA BIN HAJI DRAMAN (NO K/P: 190405-11-5173/4028091) (selepas ini dirujuk sebagai si Mati) yang meninggal dunia pada 28 April 1985 dan telah meninggalkan harta-harta yang tak berwasiat.
>
> 2. Melalui Pemberian Surat Mentadbir Harta Pusaka di bawah Permohonan No 44-16 Tahun 1988 (selepas ini dirujuk sebagai Surat Mentadbir tersebut) Defendan Pertama dan Kedua telah dilantik sebagai Pentadbir kepada harta-harta Si Mati bagi menguruskan/mentadbir harta-harta pusaka peninggalan Si Mati sebagaimana yang disenaraikan di dalam senarai Aset Si Mati yang dikepilkan bersama-sama Surat Mentadbir tersebut (selepas ini dinyatakan sebagai 'senarai harta-harta tersebut').
>
> 3. Dan melalui Perintah Mahkamah Rendah Syariah Daerah Kuala Terengganu pada 11 Julai 2006 Hakim Mahkamah Rendah Syariah telah sabit pusaka simati mengikut Hukum Faraid yang hendaklah dibahagikan secara sekaligus kepada 192 bahagian yang mana ahli-ahli waris yang berhak mendapat bahagian dan kadar bahagian yang diperolehi masing-masing adalah seperti berikut:

1. KHAIRIL ANUAR BIN MUDA (NO KP: 730828-11-5153) – 14/192
2. KAMARUZAMAN BIN MUDA (NO KP: 700720-11-5197) – 14/192
3. MOHAMAD NAJID BIN MUDA (NO KP:800713-11-5111) – 14/192
4. KHAIRUDDIN BIN MUDA (NO KP: 640323-11-5263) – 14/192
5. AZAHA BIN MUDA (NO KP: 581117-11-5193) – 14/192
6. MOHAMAD RAZALI BIN MUDA (NO KP: 761017-11-5063) – 14/192
7. RABIAH BINTI MUDA (NO KP: 560824-11-5042) – 9/192
8. KHAMSIAH BINTI MUDA (NO KP: 650324-11-5002) – 7/192
9. KHAIRUNISAH BINTI MUDA (NO KP: 670722-11-5268) – 7/192
10. KHAIRUL BARIAH BINTI MUDA (NO KP: 760720-11-5490) – 7/192
11. KHAIRULSAFWATI BINTI MUDA (NO KP: 790131-11-5502) – 7/192
12. KAMALIAH BINTI MUDA (NO KP: 750707-11-5382) – 7/192
13. AISHAH BINTI MUDA (NO KP: 801026-11-5704) – 7/192
14. ASMANORAINI BINTI MUDA (NO KP: 820523-11-5186) – 7/192
15. ENDON BINTI SEMAN (NO KP: 600524-11-5204) – 6/192
16. KHADIJAH BINTI YUSOP (NO KP: 470128-11-5138) – 6/192
17. HAMIDAH BINTI MOKTAR (NO KP: 550305-11-5172) – 6/192
18. SULONG BIN MUDA (NO KP: 501225-11-5147) – 14/192
19. RAMLI BIN MUDA (NO KP: 530713-11-5237) – 18/192

4. Semasa hayatnya simati memiliki dua (2) perniagaan Stesen Minyak Shell di Cabang Tiga dan Kuala Nerus di mana Stesen Minyak Shell di Cabang Tiga dibina di atas hartanah milik Shell (simati hanya milik perniagaan sahaja) manakala Stesen Minyak Shell di Batu Enam Kuala Nerus dibina di atas hartanah milik simati (simati memiliki perniagaan dan hartanah tersebut).

5. Defendan Pertama dan Kedua selanjutnya telah membuat satu Surat Perjanjian pada 12/12/1991 yang ditandatangani oleh Plaintif Kelima Belas, Plaintif Keenam Belas, Plaintif Ketujuh Belas, Defendan Pertama dan Defendan Kedua yang antara lain termanya ialah:

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5.1 *Stesen Minyak (Shell) Cabang Tiga diserahkan kepada pihak Ketiga yang diwakili oleh Plaintif Keenam Belas.*

5.1.1 *Sebagai bayaran di atas penyerahan tersebut pihak Ketiga* akan *membayar hutang bank sebanyak RM150,000.00.*

B

5.1.2 *Pihak Ketiga akan membayar pendahuluan sebagaimana yang akan ditetapkan oleh mesyuarat dan juga membuat bayaran ansuran sebanyak RM3,000.00 sebulan sehingga jelas hutang bank sebanyak RM150,000.00 tersebut.*

5.1.3 *Dengan itu semua pihak lain akan melepaskan segala tuntutan dan kepentingan mereka di atas stesen tersebut.*

C

5.2 *Stesen Minyak Shell Kuala Nerus (Batu Enam) diserahkan kepada Defendan Kedua.*

5.2.1 *Sebagai bayaran di atas penyerahan tersebut Defendan Kedua akan membayar hutang bank sebanyak RM450,000.00.*

D

5.2.2 *Defendan Kedua akan membayar pendahuluan sebagaimana yang akan ditetapkan oleh mesyuarat dan juga akan membuat bayaran ansuran sebanyak RM3,000.00 sebulan sehingga jelas hutang bank sebanyak RM450,000.00 tersebut.*

E

5.2.3 *Dengan itu semua pihak lain akan melepaskan segala tuntutan dan kepentingan mereka di atas Stesen tersebut.*

5.3 *Defendan Kedua akan memberi pinjaman bulan kepada yang berikut:-*

F

5.3.1 *Kamaliah – RM80.00*

5.3.2 *Mohamad Razali – RM80.00*

5.3.3 *Mohammad Najid – RM80.00*

5.3.4 *Aishah – RM80.00*

G

5.3.5 *Asma – RM80.00*

6. Ketika Perjanjian tersebut dibuat umur Plaintif Pertama sehingga Plaintif Keempat Belas ialah:

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6.1 KHAIRIL ANUAR BIN MUDA (NO KP: 730828-11-5153) – 18 tahun

6.2 KAMARUZAMAN BIN MUDA (NO KP: 700720-11-5197) – 21 tahun

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6.3 MOHAMAD NAJID BIN MUDA (NO KP: 800713-11-5111) – 11 tahun

6.4 KHAIRUDDIN BIN MUDA (NO KP: 640323-11-5263) – 27 tahun

6.5 AZAHA BIN MUDA (NO KP: 581117-11-5193) – 33 tahun

6.6 MOHAMAD RAZALI BIN MUDA (NO KP: 761017-11-5063) – 15 tahun

6.7 RABIAH BINTI MUDA (NO KP: 560824-11-5024) – 35 tahun

6.8 KHAMSIAH BINTI MUDA (NO KP: 650324-11-5002) – 26 tahun

6.9 KHAIRUNISAH BINTI MUDA (NO KP: 670722-11-5268) – 24 tahun

6.10 KHAIRUL BARIAH BINTI MUDA (NO KP: 760720-11-5490) – 15 tahun

6.11 KHAIRUL SAFWATI BINTI MUDA (NO KP: 790131-11-5502) – 12 tahun

6.12 KAMALIAH BINTI MUDA (NO KP: 750707-11-5382) – 16 tahun

6.13 AISHAH BINTI MUDA (NO KP: 801026-11-5704) – 11 tahun

6.14 ASMANORAINI BINTI MUDA (NO KP: 820523-11-5186) – 9 tahun.

[4] Many years later in 2014, the plaintiffs filed the instant suit seeking for a declaration that the agreement dated 12 December 1991 ('1991 agreement'), which was signed by the fourth, 15th, 16th, and 17th plaintiffs and both the defendants, was invalid and null and void. They also sought for an order that the administrators of the estate of the deceased, Muda bin Draman, be authorised to take control of the two petrol stations in question and the profits from the business be divided among the plaintiffs and the defendants according to their entitlement as declared in the *hukum faraid* dated 11 July 2006 after deducting all costs and expenses incurred.

AT THE HIGH COURT

[5] At the High Court, several issues were raised and considered by the learned trial judge. Firstly, the learned judge decided that the plaintiffs' claim was barred by the Limitation Act 1953 ('the LA 1953') as it was outside the six year period set out in s 6 of the LA 1953. Secondly, the court also declared that the 1991 agreement was valid and binding on all the parties even though eight of the beneficiaries were minors at the time the agreement was signed. The main reason afforded by the learned judge was that the mothers of the minors had signed the 1991 agreement on behalf of the minors.

[6] Thirdly, it was decided that the business of the two petrol stations in Kuala Nerus and Chabang Tiga rightfully belonged to the defendants as they

had complied with the terms of the 1991 agreement and had paid off all the outstanding debts in respect of the businesses after the death of the deceased. The learned judge considered that the said businesses no longer formed part of the estate of the deceased as the licence held by the deceased in respect of the businesses ended with his death.

[7] The learned judge also found that the plaintiffs' claim was an afterthought and was unreasonable after the plaintiffs themselves had benefitted from the 1991 agreement. Hence, the claim of the plaintiffs was dismissed and the counterclaim of the defendants, for a declaration that the plaintiffs had no interest in the businesses, was allowed.

THE INSTANT APPEAL

[8] Before us, the decision of the learned trial judge was assailed on a number of issues. The first issue concerned the learned judge's finding that the plaintiffs' claim was barred by limitation. In this respect, the learned judge noted that the 1991 agreement was entered into on 12 December 1991 and the plaintiffs only filed their claim on 5 November 2014, more than 20 years later. The learned judge agreed that the claim was barred by s 6 of the Limitation Act 1953.

[9] On this score, learned counsel for the appellants contended that the learned judge was in error as it was not s 6 but s 22(1)(b) of the LA 1953 which was applicable to the present case. Now, s 22 of the LA 1953 provides as follows:

> 22 Limitation of actions in respect of trust property
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> (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action —
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> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
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> (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.
>
> (2) Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued:
>
> Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property, until the interest fell into possession.

(3) No beneficiary as against whom there would be a good defence under this Act shall derive any greater or other benefit from a judgment or order obtained by any other beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence.

[10] It was plain that, in this case, the action commenced by the plaintiffs was an action by beneficiaries to recover trust property from a trustee by virtue of s 22(1)(b) of the LA 1953 (see *Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene* [1995] 1 MLJ 115; *Panchanath a/l Ratnavale (suing as the beneficiary to the estate of Ratnavale s/o Mahalingam @ Mahalingam Ratnavale deceased under will dated 10 February 1971) v Sandra Segara Mahalingam (sued as the executor and trustee of the last will of Ratnavale s/o Mahalingam @ Mahalingam Ratnavale deceased dated 10 February 1971) & Ors* [2012] 5 MLJ 109). The trust property in the form of the business of the two petrol stations was still in the possession of the trustees even though no allegations of fraud were imputed on the defendants.

[11] The upshot is that no limitation period applies. This much was also conceded by learned counsel for the respondents. We are therefore constrained to hold that the learned judge was plainly wrong in his finding that the plaintiffs' action was barred by limitation.

[12] The second ground raised by the appellants was that the learned judge was wrong in his finding that the 1991 agreement was valid and binding on all the parties. Specifically, the contention was that at the time the 1991 agreement was signed, eight of the beneficiaries were minors who had no capacity to enter into a contract.

[13] In this context, s 11 of the Contracts Act 1950, among others, provides that only persons who are of the 'age of majority' are competent to contract. There was some initial controversy in the development of the law regarding the age of majority which is not relevant to the current proceedings as much of the issues raised were later settled with the coming into force of the Age of Majority Act 1971. Under s 4 of this Act, the minority of all males and females within Malaysia ceases at the age of 18 years and 'every such male or female attaining that age shall be of the age of majority'.

[14] So what is the effect of a contract entered into by a minor? The Privy Council, in an appeal from India, in the case of *Mohori Bibee v Dharmodas Ghose* (1903) 30 Cal 539, held that the effect of ss 10 and 11 of the Indian Contracts Act (in pari materia with our ss 10 and 11 of the Contracts Act 1950) is that a contract entered into by a person who has not attained majority is not voidable but void. Our Federal Court in *Leha binte Jusoh v Awang Johari bin Hashim* [1978] 1 MLJ 202 followed the said Privy Council decision and held

that the court could not enforce the agreement entered into by a minor as it was void ab initio.

[15] Appreciating this conundrum, the learned judge in the instant case, however, accepted that with their mothers' signature to the 1991 agreement on behalf of the minors, the minors were bound by the terms of that agreement. Was he right? The law in this context appears to have developed differently in different jurisdictions. In any event, in Malaysia, this issue is now covered by statute in the form of s 15 of the Guardianship of Infants Act 1961 ('the GIA 1961') which reads:

> 15 Limitation of guardian's powers
>
> (1) A guardian of the property of an infant shall not, without the leave of the Court or a Judge —
>
> (a) sell, charge, mortgage, exchange, or otherwise part with the possession of any of the movable or immovable property of the infant; or
>
> (b) lease any land belonging to the infant for a term exceeding one year.
>
> (2) Any disposal of an infant's property in contravention of this section may be declared void, and on such declaration the Judge may make such order as appears requisite for restoring to the infant's estate the property so disposed of.
>
> (3) The Court or a Judge shall not make any order under subsection (2) unless it is necessary or advisable in the interests of the infant.

[16] This provision came up for deliberation in *Mohd Ali Jahn bin Yusop Sahibjahn v Zaleha bte Mat Zain & Anor* [1994] MLJU 474; [1995] 1 CLJ 533. In that case, by an agreement executed in 1948, the plaintiff's father, who was registered as guardian in the title of a piece of land, sold the said land to the defendant's father (purchaser). By the agreement, the plaintiff's father guaranteed that the plaintiffs, who were minors then, would execute the transfer of the land to the purchaser when they attained the age of majority. Title to the land and possession were given to the purchaser. The plaintiffs, after attaining the age of majority, refused to execute the transfer of the said land to the purchaser's widow and instead sued her for vacant possession. The widow counterclaimed for specific performance or damages for breach of contract.

[17] After a trial, the High Court held that where a minor himself signs an agreement for sale of land it is void ab initio and the agreement is absolutely void. The court also held that in light of s 15 of the Guardianship of Infants Ordinance 1934 (now repealed and replaced by the 1961 Act), which required the guardian to seek leave of the court or a judge in order to deal with the land, the purported sale was void for reason that no such leave was sought. The

agreement was therefore held to be unenforceable.

[18] Reverting to the instant case, the mothers who signed on behalf of the minors were obviously doing so as guardians of the property of the minors. In entering into the 1991 agreement, the guardians were involved in the disposal of the minors' property. It was therefore plain that s 15 of the GIA 1961 applied in the circumstances and since no leave of the court was obtained for such disposal of the minors' property, the disposal as set out in the 1991 agreement was void.

[19] We come now to the final issue which merited consideration. This concerned the finding by the learned judge that the business of the two petrol stations ended with the death of the deceased and the subsequent setting up of the new business by the defendants. What remained, it was found by the learned judge, were only the debts due as left behind by the deceased which had to be dealt with by all the beneficiaries. In other words, the profits generated by the new business set up by the defendants were no longer tied to the estate of the deceased and hence the said profits could not be divided among the beneficiaries as contended by the plaintiffs.

[20] With respect, we are compelled to observe that this finding overlooks the important fact that in the case of the Kuala Nerus petrol station, the deceased had used his own land to develop the station. It was only the petrol station at Cabang Tiga which sat on the land of the petrol company called Shell. It cannot be denied that the land of the deceased, on which the Kuala Nerus petrol station was situated, became estate property upon the death of the deceased. It was also obvious to us that the same business that was conducted by the deceased before his death continued but with the variations as requested by Shell. Hence, the learned judge was plainly in error when he declared that the business, and consequently the land on which the business was situated, was not part of the estate.

CONCLUSION

[21] In the circumstances, and for the reasons we have given, we were of the view that the decision of the High Court was plainly wrong and that appellate interference was warranted. Accordingly, we allowed the appeal and set aside the order of the High Court. In substitution we allowed the appellants' claim as set out in para 18(a), (b) and (c) of the statement of claim. In respect of prayer 18(b), and in particular the claim for the division of profits among the beneficiaries, we held for the sake of convenience and clarity that the division of profits should begin from 11 July 2006 which was the date of the *hukum faraid*.

A **[22]** Lastly, the respondents were ordered to pay to the appellants costs here and below in the sum of RM15,000 subject to payment of allocator fees. The deposit was to be refunded to the appellant.

Appeal allowed and order of High Court set aside with costs of RM15,000 subject
B *to allocator.*

Reported by Fatin Mohd Ismail

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